no one would doubt that the occupier of such house sustained a greater inconvenience from the public nuisance than the body of the community. The character of the present tort as it respects the plaintiff is precisely of this nature. I think the facts stated supported the action.

The judgment of the Circuit Court is affirmed.

United States Circuit Court, District of Missouri.

W. C. BEAN, ASSIGNEE OF CHARLES S. KINTZING, BANKRUPT, *v.* JAMES H. BROOKMIRE AND THOMAS RANKIN, JR.

Money paid by a debtor to his creditor more than four months before the commencement of proceedings in bankruptcy by or against such debtor, cannot be recovered back from such creditor by the assignee of the bankrupt, although the creditor knew that such payment was made to him by way of preference, and that the debtor was insolvent at the time of making such payment and that the same was made in contemplation of insolvency or bankruptcy.

The two clauses of the 35th section of the Bankrupt Law differ in this, that the first clause is limited to a creditor or a person having a claim against the bankrupt, or who is under liability for him, and who receives money or property by way of preference; and the second clause applies to the purchase of property of the bankrupt by any person who has no claim against him and is under no liability for him.

The word "payment" in the first part of the second clause of this section is used either inadvertently or in a loose sense with respect to some of the acts mentioned in this clause, but is intentionally omitted from the list of transactions which are declared void under this clause of the section.

The 35th and 39th sections of the Bankrupt Act are not in conflict with respect to this question. The latter section enumerates the various acts which subject a person to involuntary bankruptcy, and that is the main purpose of the section, and the fact that a preference, given by a debtor to a creditor within six months next before the filing of the petition against him in contravention of the terms of this section, is denounced as an act of bankruptcy; and that the money so paid may be recovered back by the assignee, is not inconsistent with the limitation of the right in the 35th section to cases occurring within six and four months of the commencement of bankruptcy proceedings.

The 35th and 39th sections having set up a rule at variance with the common law and with the statutes of most of the states, by which certain payments and transfers of property are declared void, very properly limit and define the circumstances within which this new rule should operate.

THIS was a writ of error to the District Court for the Eastern District of Missouri.

The plaintiff in error brought his suit to recover, as assignee of the bankrupt, the sum of $1436 paid to the defendants within

six months, but not within four months before the filing of the petition under which the bankruptcy was established. The declaration contained two counts, intended to cover the two clauses of the thirty-fifth section of the bankrupt law, in one of which the transaction was described as a payment in liquidation of an existing debt, and in the other it was alleged to have been made to defendants as creditors of the bankrupt with intent to give a preference. In both counts the insolvency of the bankrupt at the time of the transaction was alleged, and also knowledge or notice of said fact on the part of defendants, and that it was within six months of the filing of the petition in bankruptcy.

Demurrers were filed to both counts by defendants, which were sustained by the District Court, and this ruling was the error assigned.

E. T. Allen, for plaintiff.

G. M. Stewart, for defendant.

The opinion of the court was delivered by

S. F. MILLER, Circuit Judge.—The determination of the question here presented necessarily involves a construction of section 35 of the bankrupt law, or rather the two first clauses, which are in the following words:

"And be it further enacted, That if any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance, of any part of his property, either directly or indirectly, absolutely or conditionally—the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and that such attachment, payment, pledge, assignment, or conveyance is made in fraud of the provisions of this act—the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited.

"And if any person being insolvent, or in contemplation of

insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance, or any disposition of any part of his property to any person who then had reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and such payment, sale, assignment, transfer, or other conveyance is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this act, or to defeat the object of, or in any way impair, hinder, impede, or delay the operation and effect of, or to evade any of the provisions of this act, the sale, assignment, transfer, or conveyance shall be void, and the assignee may recover the property or the value thereof, as assets of the bankrupt. And if such sale, assignment, transfer, or conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be *primâ facie* evidence of fraud."

And we commence the examination into the true meaning of the section in its application to the question before us by affirming what I am told was held in this same court at the last term, namely: that the two clauses differ mainly in their application to two different classes of recipients of the bankrupt's property or means. That is to say, that the first clause is limited to a creditor, or person having a claim against the bankrupt, or who is under any liability for him, and who receives the money or property by way of preference; and the second clause applies to the purchase of property of the bankrupt by any person who has no claim against him, and is under no liability for him. That the first clause is confined to persons of that character named, cannot well be doubted, since the acts therein mentioned are acts done with persons of that character, and must be done with a view to giving such a person a preference over others of the same class. That the second clause has reference to another class of persons and is governed by other rules seems to be strongly sustained by these considerations. 1. The sale or other transfer of property mentioned in it need not be in *preference* of a creditor or person liable for the bankrupt, to render it void. 2. It need not be made to a person of that character. 3. In the first clause the transfer may still be valid, although within all other conditions of the clause, if made more than *four* months before the filing of a petition in bankruptcy, while the transfer described in the

second clause requires that it shall have been made more than *six* months before the filing of the petition to have the same effect.

These are sufficient reasons to justify our conviction that the two clauses apply to transfers to two different classes of persons dealing with the bankrupt.

It is objected to this view that in the second clause "*payment*" is one of the acts described, as well as in the first, and that the word necessarily implies a transaction between debtor and creditor.

The force of this objection is fully met by the language of that part of the section which makes void the acts against which it is directed, and which while declaring that such "sale, assignment, transfer, or conveyance shall be void, and the assignee may recover the property, or the value thereof," omits to make any such provision as to "*payment*," while in the invalidating language of the first clause that is the first word used.

The word payment may have been used in the second clause inadvertently, or in a loose sense, to include some consideration advanced by the insolvent in some one of the transactions otherwise forbidden, but, however it came to be used, it is quite certain that it is intentionally omitted when the transactions are mentioned which are declared to be void.

The *payment* described in both counts of this declaration is not one covered by the second clause of the section. It is a payment of money to a creditor on account of an existing debt, and is a preference within the meaning of the law. It is clearly one of the transactions described in, and forbidden by the first clause, and therefore not included within the second. We need therefore inquire no further concerning the relation to the latter.

In regard to the first clause, both counts would be good under that if they contained the averment that the transactions described took place within four months before the filing of the petition in bankruptcy. But, this allegation cannot be truthfully made, and the principal question in this case is, whether this is necessary to make the count good.

The language of the section is, that "if any person being insolvent, or in contemplation of insolvency, within four months of the filing of the petition by or against him, with a view to give the creditor a preference," do any of the acts therein mentioned, the act shall be void, and the assignee may recover the property

from the person receiving it, if such person had reasonable cause to believe the party insolvent. It is very certain that the act described is not made void by this clause, or by any clause in this section, unless it was done within four months of the filing of a petition by or against the bankrupt, and it is as strong an instance as can well grow out of a negative pregnant, that no such act is void for any of the causes there mentioned, that was not done within the four months.

In opposition to this view of the subject, it is earnestly contended that one of the clauses of the thirty-ninth section of the act describes pretty nearly in the same language the acts mentioned in the thirty-fifth section, and concludes that section with the declaration that if the person doing such acts, shall be declared bankrupt, the assignee may recover the property transferred, contrary to the provisions of the statute, making no restriction as to time. And that the two sections can only be reconciled in this regard by holding that the special provisions of section thirty-five are to be taken as a rule of evidence not imperative but *primâ facie*, that the transaction was fraudulent if within the period therein mentioned.

Having thus stated the opposite opinions of this thirty-fifth section, maintained by counsel, I do not know that I can do better than to state my own views of the policy which governed Congress in its adoption.

The acts mentioned in the sections are not such as were forbidden by the common law, or generally by the statutes of the states. Nor are they acts which in their essential nature are immoral or dishonest. For a man who is insolvent, or approaching insolvency, to pay a just debt is not morally wrong, nor was it forbidden by any law in this country previous to the bankrupt act. And though a preference of creditors by transfer or assignment of property by an insolvent may sometimes be unjust to the other creditors, it was not forbidden by many of the states.

It is very certain that such a preference may consist with the highest obligations of morality, and under circumstances which any one can imagine, it may be the dictate of the purest justice in reference to all concerned. The careful and diligent framers of the bankrupt act were fully aware of all that has just been said. But they were about to frame a system of law, one main feature of which was to provide for the distribution of the pro-

perty of an insolvent debtor among his creditors; and they adopted wisely, as the general and pervading rule of distribution, equality among creditors. But they found that this general principle could not, without hardship, be made of universal application; when a creditor had obtained by fair means a lien on any property of the bankrupt, that lien ought to be respected. If he had so obtained payment of the whole, or a part of his debt, the payment ought to stand. These exceptions to the general rule of distribution were, however, liable to be abused, and might be used to defeat the purposes of the bankrupt law. The bankrupt knowing that he must soon be helpless, would desire to pay some favorite creditors. They, knowing his inability to pay, and his liability to be called into a bankrupt court, would naturally desire to secure themselves at the expense of other creditors.

In this dilemma Congress said, We cannot prescribe any rule by which preference would be held to be morally right or wrong, and it would be fatal to the administration of the law of distribution to permit such a question to be raised. We will, therefore, adopt a conventional rule to determine the validity of these preferences. In all cases where an insolvent pays or secures a creditor to the exclusion of others, and that creditor is aware that it is so when he receives it, he shall run the risk of the debtor's continuance in business for four months. If the law which requires equal distribution is not called into action for four months, the transaction being otherwise honest, shall stand, but if by the debtor himself, or by any of his creditors, that law is invoked within four months, the transaction shall not stand, but the money or property received by the party shall become a part of the common fund for distribution.

Congress, in this view, seems also to have thought that in case of a creditor who had parted with his money or property to the insolvent party, and whose reasons for such further dealing with him, were more pressing that he might be saved from an impending loss, the time which should secure the transaction from the effect of the bankrupt law should be less by two months than in the case of one who having no such incentive to action, became a volunteer purchaser of an insolvent's property with knowledge of his insolvency.

It is in a similar spirit that the provision in section 23, which forbids a person accepting such a preference from sharing in the

assets of the bankrupt, uses the qualifying phrase, "until he shall first have surrendered to the assignee all that he had received under such preference."

I do not see any necessary contradiction between section 39 and this view of section 35. The former section is a very long one and recites all the acts which subject a person to involuntary bankruptcy: and that is the main purpose of the section. Among the acts which constitute a man a bankrupt are those of giving preference to creditors in contemplation of bankruptcy. And it is in the conclusion of that section declared in general terms that if the debtor shall subsequently be declared a bankrupt, his assignee may recover the money or other property, which was the subject of the act of bankruptcy. But this general declaration of the right of the assignee to recover is not inconsistent with the limitation of the right in another section to cases accruing within six and four months of the commencement of the bankruptcy proceedings. The general declaration of a state statute that a person shall recover land by an action of ejectment, is not inconsistent with the provision in the Statute of Limitations that such actions must be brought within ten years after they have accrued. Nor is it inconsistent with the still more comprehensive right of suit conferred on the assignee by the 14th section of the act.

The 35th section and the 39th section having for the first time set up a rule by which certain payments and transfers of property shall be declared void, a rule at variance with common law and with the statutes of the states, very properly limits and defines the circumstances within which this new rule should operate. These are, among others, that the recipients of the bankrupt's money or property must have had reasonable cause to believe he was insolvent, and that the transaction must have been recent, when the bankrupt law was applied to the case of a creditor within four months, and of a general purchaser within six months. As to all illegal and fraudulent transactions which are so by common law, by statute law, or by any other recognised rule, other than these special provisions of the bankrupt law, that act has imposed the limitation of two years on the assignee, in bringing his suits, and by that they are governed. But the case made by the plaintiff does not come within any such law known to us.

Therefore his declaration is bad, and the demurrer was properly sustained by the District Court, whose judgment is affirmed.